Supreme Court, U.S.
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IN THE UNITED STATES
SUPREME COURT

BILAL MAHMUD

Plaintiff-Appellant

v.

JUSTIN P. OBERMAN

Defendant-Appellee

PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEAL OF THE ELEVENTH CIRCUIT STATE OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Whether, in a *Bivens* action, a federal court has jurisdiction to grant equitable relief as a remedy for deprivation of property under the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

All of the parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit are completely and correctly listed in the caption.

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STATEMENT OF THE BASIS FOR JURISDICTION

(i) The judgment by the Court of Appeals was entered on January 16, 2008. This petition is timely filed pursuant to Rule 13, The ninetieth (90th) day after the judgment was rendered is Monday, April 15, 2008.

(ii) There has been no request for rehearing or rehearing "en banc" before the United States Court of Appeals for the Eleventh Circuit, nor has there been a request to extend the time to file this petition for a Writ of Certiorari.

(iii) The statutory provision conferring jurisdiction on this Court is 28 U.S.C. § 1254(1) and the opinion below is reported at *Mahmud v. Oberman.*, U.S. App. Lexis 1068 (11th Cir. 2008).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the United States Court of Appeals for the Eleventh Circuit:

The basis for federal jurisdiction in the Eleventh Circuit is that it was an appeal as a matter of right from a final judgment of a United States District Court involving a provision of the United States Constitution. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE FACTS

Preliminary Statement

Pursuant to Rule 12(b)(6), Fed.R.Civ.P., federal courts are required to accept as true those facts which plausibly suggest entitlement to relief. *Bell Atlantic Corporation, et. al., v. William Twombly, 550* U.S.-, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Accordingly, the facts set forth herein are taken directly from Mahmud's Amended Complaint.

Facts

Mahmud, a male natural born citizen of the United States, is a descendent of slaves and was born in Richmond, Virginia. Mahmud lives in the Northern District of Georgia. Mahmud, a veteran, served in combat in combat in Vietnam, and received an honorable discharge from the United States Marine Corps. Mahmud does not smoke, drink

alcohol, or use controlled substances nor has he ever done so. Mahmud is married with three (3) children.

Mahmud, a Muslim and observant adherent to Islam, has never been arrested or convicted of any crime or participated or encouraged any act of sedition against the United States of America. Mahmud has never violated any federal, state or local law or regulation designed to prevent terrorism and/or secure the safety of citizens of the United States of America, nor has he engaged in any act, within or without the United States, which would cause a reasonable person to believe that Mahmud may have violated any such federal, state or local law or regulation. Mahmud has never been interviewed by any law enforcement official or any employee or official of any United States agency, including, without limitation, the Department of

Homeland Security. Mahmud is a co-founder and serves as one of five permanent members of the Board of Trustees of the Al-Faroog Masjid of Atlanta, a religious institution (Mosque) devoted to the service of the international Muslim community of greater Atlanta and the Southeastern United States of America. Al-Farooq Masjid is a nonprofit, non-political, religious organization.

Mahmud does not belong, and has never belonged, to any organization, which has been designated as a terrorist organization by the United States Department of State or any other federal, state or local government organization. Mahmud has been charged by the Board of Trustees of the al-Farooq Masjid with the distribution of charitable donations made to the institution for indigent members of the Atlanta community, both Muslim

and non-Muslim. This charitable work includes, without limitation, distribution of food and other essentials to the poor, elderly and infirm.

Mahmud is a model, loyal United States citizen who placed himself in harm's way to serve his country in the United States Armed Forces, who strictly complies and has always complied with the laws of the United States, and local governments, who serves his community by assisting those in need.

For twenty (20) years immediately prior to August 10, 2004, Mahmud was an employee of Old Dominion. During the course of his employment, Mahmud was never disciplined or reprimanded, orally or in writing, in any manner or form whatsoever. To the contrary, Mahmud was a model employee who timely, efficiently, and professionally

performed his job at Old Dominion without incident or making any complaint whatsoever.

On July 30, 2004, Defendants Oberman, and the other Defendants herein, acting through the United States Department of Homeland Security, revoked the endorsement on Mahmud's commercial driver's license that allowed him to transport so-called "hazardous" materials, primarily paint and corrosives, such as batteries. Prior to the action undertaken by the Defendants herein, Mahmud did not transport any form of explosives or material used in warfare, except for transporting a truck load of ammunition to the Atlanta Federal Penitentiary two or three times in twenty years of employment.

At the time that the Defendants undertook to revoke Mahmud's hazardous materials endorsement, Defendants were aware that Mahmud has not

engaged and had no reasonable suspicion, much less probable cause, to believe that Mahmud had engaged in any activity related to terrorism, was a threat to national security, or posed any danger whatsoever to transportation security. On the contrary, Defendants were well aware that Mahmud had never encouraged or engaged in any act of terrorism (including the financial support of terrorism), within or without the United States, and was not a threat to National Security, or transportation security.

Despite his knowledge that Mahmud had never encouraged or engaged in any act of terrorism (including the financial support of terrorism), within or without the United States, was not a threat to National Security or transportation security, Defendant nevertheless suspended Mahmud's hazardous materials endorsement on his driver's

license, causing him to lose his long-time position with Old Dominion.

Defendant Oberman, and, upon information and belief, the other defendants[1], falsely stated in writing that he had "personally reviewed" material which indicated that Mahmud was a threat to national security, transportation security, and had engaged and/or encouraged terrorism. At all times relevant to this action, Defendants acted maliciously, wantonly, and with reckless disregard for the Constitutional rights of Mahmud. As a direct and proximate result of Defendants' actions, Mahmud has suffered financial and emotional harm for which he is entitled to recover.

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[1] Because discovery in this action never began, the "John Doe" Defendants were never identified.

ARGUMENT

There is no question that Mahmud's driver's license and hazardous materials endorsement is Constitutionally protected property that cannot be taken away without due process. *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)("Once [Georgia driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.")

The facts as alleged in the Amended Complaint make it plain that Mahmud's livelihood was dependent upon his driver's license and the

hazardous materials endorsement, which was a required part of his job.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619 (1970) provides a cause of action against a federal agent who, while acting under the color of federal law, violates the constitutional rights of an individual.. *Bivens* actions are brought directly under the Constitution, without specific statutory authorization. While *Bivens* involved alleged violations of the Fourth Amendment, this Court has held that Bivens provides a right of action for violations of the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

Damages can be obtained in a *Bivens* action are generally limited to circumstances where (1) the plaintiff has no alternative means of obtaining redress and (2) no "special factors counseling hesitation" are present. *Stephens v. Dep't of Health & Hum. Servs.*, 901 F.2d 1571, 1575-76 (11th Cir. 1990), *cert. denied*, 498 U.S. 998, 111 S. Ct. 555, 112 L. Ed. 2d 562 (1990). Those special factors "include an appropriate judicial deference" toward the will of Congress: "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S. Ct. 2460, 2468, 101 L. Ed. 2d 370 (1988).

The question of whether a comprehensive remedial scheme precludes an action seeking to recover damages under *Bivens* arises most frequently in cases involving federal employees or ultimate beneficiaries of federal entitlement programs, such as Social Security. *United States v. Fausto*, 484 U.S. 439, 455, 108 S. Ct. 668, 677, 98 L. Ed. 2d 830 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S. Ct. 2460, 2468, 101 L. Ed. 2d 370 (1988). The circuits appear to agree that a comprehensive remedial scheme in a governing statute precludes recovery of damages in a *Bivens* action.

However, the question of whether a remedial scheme under a statute precludes an action for equitable relief remains an open question with

differing results and commentary among the circuits. The District of Columbia Circuit held that a federal court's power to award equitable relief is broader than its power to award equitable relief. *Hubbard v. EPA*, 257 U.S. App. D.C. 305, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) *vacated on other grounds by Spagnola v. Mathis*, 273 U.S. App. D.C. 247, 859 F.2d 223 (D.C. Cir. 1988) (en banc). Similarly, in *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995)(Alito, J.), the Third Circuit stated:

> The power of federal courts to grant equitable relief for constitutional violations has long been established. Thus,, . . . there is a 'presumed availability of federal equitable relief against threatened invasions of constitutional interests.' It is reasonable to assume that Congress legislates with the understanding that this form of judicial relief is generally available to protect constitutional rights. While Congress may restrict the availability of injunctive relief, we believe that we should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights.

Mitchum, 73 F.3d at 35. *Mitchum* partially relied upon the D.C. Circuit's *en banc* decision in *Spagnola v. Mathis*, 273 U.S. App. D.C. 247, 859 F.2d 223 (D.C. Cir. 1988), which held that " . . . time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." The Ninth Circuit recently issued a decision in which it specifically agreed with the holding and reasoning of *Mitchum* and *Spagnola*. *See American Federation of Government Employees v. Stone*, 502 F.3d 1027, 1039 (9th Cir. 2007).

While this court has been reluctant to authorize damages awards with specific Congressional intent, this Court has not seen fit to limit the broad authority of the federal courts to grant equitable relief. *Carlson v. Green*, 446 U.S. 14,

42, 100 S.Ct. 1468, 1484, 64 L.Ed.2d 15 (1980)(*Rehnquist, J. dissenting*). In *Carlson*, a *Bivens* case, former Chief Justice Rehnquist, while arguing that federal courts are not empowered to infer a private civil damage remedy from any constitutional provision, suggested that courts did have the authority to grant equitable relief. See also *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)(Excepting actions seeking equitable relief from Eleventh Amendment immunity).[2]

The First, Second and Tenth Circuits have issued opinions indicating that, at least in the

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[2] Even though *Ex Parte Young* is said to have been based upon a legal fiction, *see e.g. Central Virginia Comm. College v. Katz*, 546 U.S. 356, 378 n.14, 126 S.Ct. 990, 1005, n.14, 163 L.Ed.2d 945 (2006), the legal principle, i.e. allowing courts broad authority to award equitable relief even where legal relief is unavailable, is established law.

context of suits involving federal employees, constitutional claims seeking equitable relief as well as damages are precluded. *Dotson v. Griesa*, 398 F.3d 156, 181 (2d Cir. 2005); *Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 962 (10th Cir. 1989); *Berriors v. Dep't of Army*, 884 F.2d 28, 31 (1st Cir. 1989).

The Fourth and Seventh Circuits have not decided the issue. *Bryant v. Cheney*, 924 F.2d 525, 528 n.2 (4th Cir. 1991); *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996). The Eleventh Circuit appears to have issued inconsistent opinions. *Hardison v. Cohen*, 375 F.3d 1262, 1267-1268 (11th Cir. 2004)(Concluding that equitable relief was not precluded after reviewing its decisions in *Stephens v. Dep't of Health & Hum. Servs.*, 901 F.2d at 1575-76 with *Perry v. Thomas*, 849 F.2d 484, 484 (11th Cir. 1988) (*per curiam*).

In *Hardison*, the Eleventh Circuit concluded that it was only required to face the question of whether equitable remedies are available where a property interest was implicated. *Hardison*, 375 F.3d at 1268. In the instant case, there does not appear to be much doubt that Mahmud had a property right in the hazardous materials endorsement to his driver's license, which was required for his livelihood. *Burson, supra.* The idea that an official of a federal agency can unilaterally take away a citizen's property based upon race or ethnicity without due process of law is inimical to the Constitution. National Security considerations cannot automatically override a citizen's right to due process. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).

Mahmud contends that the trial court should have held a hearing or allowed limited discovery on the issue of personal jurisdiction. In this instance, the questions was whether or not sufficient "minimum contacts" exist to satisfy Due Process. such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

The Georgia Long Arm Statute allows Georgia courts to exercise personal jurisdiction over a nonresident if the defendant: (1) transacts any business within the state; (2) commits a tortious act or omission within the state, except as to a cause of action for defamation of character arising from the act; (3) commits a tortuous injury in the state caused by an act or omission outside the state if the tort-

feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state; or (4) owns, uses, or possesses any real property situated within the state.

In the instant case, the complaint clearly alleges that Defendant Oberman, and perhaps others, intentionally deprived Mahmud, a United States citizen, of his rights under the United Constitution. The complaint alleges that the tortuous act and the resulting injury occurred in the State of Georgia. The allegations in the complaint fairly set forth a prima facie case for personal jurisdiction because handling matters within the State of Georgia was within the scope of Oberman's job at the time of the act and injury. In the Eleventh Circuit, as in other circuits, the law is clear that a

district court may allow limited discovery on the issue of personal jurisdiction because the question is fact driven. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997)("Resolution of a pretrial motion that turns on findings of fact--for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2)—may require some limited discovery before a meaningful ruling can be made.") This case is one in which pretrial discovery should be allowed because the allegations are that the primary Defendant's act was willful, that it occurred in the State of Georgia and that the resulting injury occurred here. Under these circumstances, discovery, at least with regard to the issue of personal jurisdiction, should be allowed to proceed.

This 16th day of June 2008.

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on June ____, 2008, I caused to be served by first class U.S. Mail, postage prepaid, three true and correct copies of the foregoing Petition for Writ of Certiorari addressed as follows:

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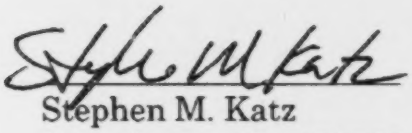

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 0713311
Non-Argument Calendar

D.C. Docket No. 06-01720-CV-CWSD-1

BILAL MAHMUD,

Plaintiff-Appellant,

KAHIJAH MAHMUD,

Plaintiff,

versus

U.S. DEPARTMENT OF HOMELAND SECURITY, et. al.,

Defendants,

JUSTIN P. OBERMAN, individually and in his official capacity as Director, Credientialing Program Office,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 16, 2008)

Before CARNE, PRYOR and HILL, Circuit Judges.

PER CURIAM:

Plaintiff-appellant Bilal Mahmud appeals the dismissal of his actions. The judgement of the district court was accompanied by a full published opinion, *Mahmud v. Oberman,* 508 F.Supp. 2d 1294 (2007). In his complaint, Mahmud asserted claims which he sought to establish under the *Bivens* doctrine, 403 U.S. 388, 397 (1970), based upon the suspension or revocation of the Hazardous Materials Endorsement on his commercial drivers license. Based on the facts of this case, the district court held that a *Bivens* remedy for damages was not available to Mahmud, and, furthermore, Mahmud had not met his burden of establishing that due process is satisfied by the exercise of personal jurisdiction over defendant-appellee Justin P. Oberman. It granted Oberman's motion to dismiss for both reasons.

Having carefully considered the judgement and opinion of the district court, the briefs of the parties, and the record, and finding no reversible error, the judgment is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILAL MAHMUD **Plaintiff,** **v.** **JUSTIN P. OBERMAN, et al.,** **Defendants**	1:06-cv-1720-WSD

OPINION AND ORDER

This matter is before the court on Defendant Justin P. Oberman's ("Defendant") Motion to Dismiss [23].

I. INTRODUCTION

This is a Bivens action filed by Plaintiff Bilal Mahmud ("Plaintiff"), a Muslim, against Defendant Justin P. Oberman, the former Director of the Credentialing Program Office for the Transportation Security Administration ("TSA") and numerous John Doe defendants. [1] Plaintiff asserts his claims against

Defendant solely in his individual capacity.

From December 1984 through August 2004, Plaintiff was employed as a commercial truck driver with Old Dominion Freight Line ("Old Dominion"). He had a commercial driver's license with a Hazardous Material Endorsement ("HSE"), an authorization by the federal government to transport hazardous materials.[2] On July 30, 2004, Defendant, acting through the United States Department of Homeland Security, revoked the HME on Plaintiff's commercial driver's license. Defendant revoked the HME under the Hazardous Materials

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[1]"[F]ictitious party practice is not permitted in federal court." New v. Sports & Recreation, Inc., 114 F.3d 1092, 1094 n.1(11th Cir. 1997); see also Lewis v. City of Montgomery, No. 2:04-CV-858-WKW, 2006 WL 1761673, at *2 (M.D. Ala. June 27, 2006) ("In general, 'fictitious-party pleading is not permitted in federal court.'") While courts have sometimes made exceptions when the plaintiff may be able to describe an individual (e.g., the driver of an automobile) without stating his name precisely or correctly, the unspecific description of the John Doe defendants in this case does not fall under this exception. Dean v. Barber, 951 F.2d 1210, 1215-16 (11th cir. 1992) (finding plaintiff's description of "Chief Deputy of the Jefferson County Jail" John Doe sufficient because the proposed defendant existed and plaintiff adequately described the person to be sued so that the person could be identified for service). Defendants John Does I to X are therefore dismissed.

[2] For purposes of a motion to dismiss, the court takes Plaintiff's allegations as true. Thus, the court discusses the facts as they are alleged by Plaintiff in his Complaint.

Threat Assessment Program ("the Program"), which prohibits any individual from possessing a license to transport hazardous materials in commerce unless the Transportation Secretary has first found that the individual does not pose a security risk. See 49 U.S.C. §§ 5101,5103(b)(1). The Program sets forth procedures for revoking an individual's HME as well as for appealing both the initial and final agency decisions.

Plaintiff claims that when Defendant revoked his HME, Defendant knew that Plaintiff had not engaged in any terrorism-related activity and had no reasonable suspicion of such activity. Plaintiff further alleges that Defendant falsely stated in writing that he had personally reviewed material indicating that Plaintiff was a threat to national security and transportation security, and had engaged in or encouraged terrorism. Plaintiff alleges the suspension of his endorsement caused him to lose his position as a truck driver with Old Dominion.

On July 24, 2006, Plaintiff filed this actin, asserting five claims against numerous defendants, including Oberman, Old Dominion, the United States Department of

Homeland Security, the TSA, the Georgia Department of Motor Vehicle Safety, and numerous individuals. On November 3, 2006, Plaintiff dismissed all the defendants, except Oberman, and filed an Amended Complaint asserting a single Bivens claim against Oberman. Plaintiff claims Defendant deprived him of his due process rights under the Fifth Amendment by revoking his HME.

On January 29, 2007, Defendant filed this Motion to dismiss the Amended Complaint. He argues that: 1) Plaintiff cannot establish personal jurisdiction over him; 2) Plaintiff has no right of action for due process violations where administrative and judicial review was available and prompt action was necessary to protect homeland security; and 3) Defendant is entitled to qualified immunity.

II. DISCUSSION

A. Standard on Motion to Dismiss

The law in this Circuit governing motions to dismiss pursuant to Rule 12(b)(6) for failure to state a claim is well-settled. Dismissal of a complaint is appropriate only "when, on the basis of a dispositive issue of law, no construction of

the factual allegation will support the cause of action." Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th cir. 1993). "Although a plaintiff is not held to a very high standard in a motion to dismiss for failure to state a claim, some minimal pleading standard does exist." Wagner v. Daewoo Heavy Indus. Am. Corp., 289 F.3d 1268, 1270 (11th Cir.) *rev'd on other grounds*, 314 F.3d 541 (11th Cir. 2002) (en banc). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1263 (11th Cir. 2004) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.") (citations omitted).

In considering a defendant's motion to dismiss, the court accepts the plaintiff's allegations as true Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), and construes the complaint in the plaintiff's favor. Duke v. Cleland, 5 F.3d 1399, 1402 (11th cir.1993). to survive a motion to dismiss, a complaint need not contain "detailed factual allegations, " but

must "five the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 127 SCt. 1955, 1964 (2007). Ultimately, the complaint is required to contain "only enough facts to state a claim to relief that is plausible on its fact." Id. at 1974.

B. Private Right of Action through *Bivens*

Defendant argues that Plaintiff has no private right of action because administrative and judicial review of any adverse decisions were available to Plaintiff, and the revocation action was necessary to protect homeland security. Plaintiff argues he is entitled to damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, which permits a cause of action against a federal agent who, while acting under the color of federal law, violates the constitutional rights of an individual. Bivens, 403 U.S. 388, 397 (1970). Bivens actions are brought directly under the Constitution and are necessarily limited because they are brought without a statute providing a right of action.

The Eleventh Circuit has made clear that a Bivens actin for damages is available *only* where: "(1) the plaintiff has no alternative means of obtaining redress and (2) no 'spe-

cial factors counseling hesitation' are present." Hardison v. Cohen, 375 F.3d 1262, 1264 (11th cir. 2004) (citing Stephens v. Dep't of Health & Hum. Servs., 901 F.2d 1571, 1575-76 (11th Cir. 1990)). "those special factors 'include an appropriate judicial deference' toward the will of Congress," and when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the court will not fashion additional Bivens remedies. Id. (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)). The Supreme Court has "responded cautiously to suggestions that Bivens remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not be any means necessarily imply that courts should award money damages against the officers responsible for the violation." Chilicky, 487 U.S. at 4212.

A court will not fashion a Bivens remedy even if the statutory remedy does not provide complete relief. For example, in Bush v. Lucas, the Supreme Court prohibited a federal employee from asserting, under the First Amend-

ment, a Bivens action against his former government agency employer. Bush v. Lucas, 462 U.S. 367 (1983). The Court reasoned that, although the existing remedies would not allow complete relief, the statutory remedial scheme was "clearly constitutionally adequate." Id. at 378 n.14. The Bush court noted that Congress is in a better position to decide whether or not the public interest would be served by a damages remedy, and courts should not modify or supplement "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, . . . [with] a new judicial remedy for the constitutional violation at issue." Id. at 388; see also Chilicky, 487 U.S. at 428-29 (declining to allow plaintiffs, who asserted a Fifth Amendment due process violation because their Social Security disability benefits were wrongfully terminated, to maintain a Bivens action and stating that although they could not be "fully remedied by the belated restoration of back benefits," "Congress is the body charged with making the inevitable compromises" in fashioning remedies for injuries relating to "massive and complex" government programs).

An important consideration in deciding whether a regulatory scheme is sufficiently comprehensive to constitute a "special factor" is whether it provides "meaningful safeguards or remedies" for the plaintiff. Chilicky, 487 U.S. at 425; Spagnola v. Mathis, 859 mF.2d 223, 228 (D.C. Cir. 1988) ("[C]ourts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve Bivens remedies.').

The Hazardous Materials Threat Assessment Program enacted by Congress is a comprehensive effort to regulate the safety of, and avoid risks associated with, hazardous material transportation. The Program provides remedial mechanisms for individuals adversely affected by regulatory action under the Act, sets forth reasonable procedures for revoking a individual's HME, and provides an appeal of both the initial and final agency decisions.

Agency regulations state that an individual cannot possess an HME unless he or she meets several criteria. 49

U.S.C. §§ 5101, 5103(b)(1); 49 C.F.R. § 1572.5(b)(1)(i), amended by 69 Fed. Reg. 68,742 (Nov. 24, 2004).[3] An individual cannot possess an HME if the TSA has notified the person that he poses a security threat warranting denial of the endorsement. 49 C.F.R. § 1572.5(b)(1)(i)(D).

Once a determination is made that an individual poses a security threat, the TSA issues an Initial Notification of Threat Assessment ("Initial Notification"). Id. at § 1572.5(g)(2). The Initial Notification informs the individual that the TSA has deemed him a security threat, states the basis for the determination, describes the procedure for correcting the records, and provides information about the appeals process. An individual may appeal an Initial Notification by asserting that he does not pose a security threat, and the affected person must submit a written reply to the TSA or request the materials upon which the Initial Notification was

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[3] TSA's administrative regulations were amended by 69 Fed. Reg. 68,742 (Nov. 24, 2004), but the Court refers to the 2003 regulations because they were in effect at the time of the incidents alleged in the Complaint.

based. Id. at § 1572.141(d). If an individual requests the materials, the TSA provides copies of all releasable, non-classified information on which the Initial Notification was based.

After review is requested, the Associate Administrator/Chief Operating Officer of the TSA reviews the Initial Notification, the supporting materials, the individual's reply, and any other relevant information. If the TSA cannot conclude the individual poses a security threat, it must withdraw its Initial Notification. If the TSA again determines that the individual poses a security threat, it issues a Final Notification of Threat Assessment ("Final Notification"). Id at § 1572.141(e)(1)-(3).

If a Final Notification is issued, the individual may seek judicial review of the final determination in accordance with the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 702, 704; 49 U.S.C. § 5127. The APA gives a reviewing court broad discretion to fashion a remedy, other than money damages, including "hold[ing] unlawful and set[ting] aside agency action, findings, and conclusions found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] (b) contrary to constitutional right, power,

privilege or immunity." 5 U.S.C. § 706(2)(A), (B).

The Court concludes that the Program provides a meaningful remedy and review procedure for Plaintiff in this case. An individual aggrieved by the TSA's revocation of his HME can seek administrative review of the decision and have it restored through the process provided under federal regulations and the review procedures pursuant to the APA. "[T]he existence of a right to judicial review under the APA is, alone, sufficient to preclude . . . a Bivens action." Miller v. United States Dep't of Agric. Farm Servs. Agency, 143 F.3d 1413, 1416 (11th Cir. 1998).

The mechanisms under the APA would not constitute a complete remedy, but "the Constitution does not require Congress to provide comprehensive relief for violations of . . . constitutional rights." Id. In determining whether a right of action exists under Bivens, the Court acknowledges the will of Congress in enacting the Program to protect against threats to citizen safety. The design of the Program evidences that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, that Plaintiff has

meaningful means of obtaining redress, and that there are special factors counseling against this Court creating a damages remedy in the context of a program which addresses an important issue of citizen well-being and safety. The Court concludes that a Bivens remedy was not contemplated, is not warranted, and thus is not available in this case, and Plaintiff's claim must be dismissed.[4]

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[4] Although the Court did not consider it in deciding this motion, the efficacy of the remedial mechanisms under the Program is further demonstrated by Plaintiff's successful appeal of the revocation of his HME. In his original complaint, Plaintiff admitted he provided TSA with additional background information, and TSA subsequently reversed its initial threat assessment and notified the Georgia Department of Motor Vehicles that Plaintiff was eligible to hold an HME.

C. Personal Jurisdiction

Even if a Bivens remedy were available here, the Amended Complaint should be dismissed for lack of personal jurisdiction because Georgia's long-arm statute and the requirements of due process are not satisfied. Where an evidentiary hearing is not held[5] on a motion to dismiss for lack of personal jurisdiction, a plaintiff must establish a prima

facie case of jurisdiction to survive a motion to dismiss. Francosteel Corp. v. M/V Charm. 19 F.3d 624, 626 (11th Cir. 1994). "The court construes the allegations in the complaint as true to the extent that they are uncontroverted by defendant's evidence." Paul, Hastings, Janofsky & Walker v. city of Tulsa, Okla., 245 F.Supp. 2d 1248. 1253 (N.D. Ga. 2002) (citations

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[5] Neither party requested a hearing in this case.

omitted). "Where there are conflicts between the parties' evidence, the court makes all reasonable inferences in favor of the plaintiff." Id.

"In the Eleventh Circuit, a determination of personal jurisdiction requires consideration of both the Georgia long-arm statute and the Due Process Clause of the United Staters Constitution." Paul, Hastings, 145 F. Supp. 2d at 1253. In Burger King Corp. v. Rudzewicz, the Supreme Court stated that due process dictates that a nonresident defendant may

be subject to personal jurisdiction when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

"Due process contemplates two types of jurisdiction over the person: general and specific jurisdiction." Paul, Hastings, 245 F. Supp. 2d at 1253; see also Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 747 (11th Cir. 2002). A nonresident defendant's "contacts with the forum that are unrelated to the litigation must be substantial in order to warrant the exercise of general personal jurisdiction." Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1274 (stating that "the due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction, and require a showing of continuous and systematic general business contacts between the defendant and the forum state").

In this case, Defendant states that he has never lived in Georgia or owned property in Georgia. From November 2001 to December 2005, Defendant resided in Washington, D.C., and worked for the TSA in Washington, D.C., and Arlington, Virginia. During his four-year employment with the

TSA, Defendant traveled to Georgia on business for three or four one-day trips. None of the visits related to Plaintiff's case or the Program. Defendant currently resides in Chicago and owns a consulting company. Defendant states that in April and August 2006, he was in Georgia on business for two two-day trips for his current employment. These minimal contacts, occurring over the span of six years, do not demonstrate continuous and systematic general business contacts between Defendant and Georgia and are clearly insufficient to establish the more stringent general personal jurisdiction over Defendant.

"A nonresident defendant may be subject to specific jurisdiction in a state when: (1) it has purposefully established minimum contacts with the forum state; and (2) the exercise of jurisdiction will not offend traditional notions of fair play those same governmental officials in their individual capacities." Wag-Aero, Inc. v. United States, 837 F. Supp. 1479, 1485 (E.D. Wis. 1993), aff'd 35 F.3d 569 (7th Cir. 1994) (citing Stafford v. Briggs, 444 U.S. 527, 543-45 (1980)).[7]

[7] Even though Defendant signed the notice of revocation and mailed it to Plaintiff who received it in Georgia, "[i]t is well-established that phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts." Far West Captial, Inc. v. Towne, 46 F.3d 1071, 1077 (10th Cir. 1995); see also Lockard v. Equifax, Inc., 163 F/3d 1259, 1265-66 (11th Cir. 1998) (finding no personal jurisdiction existed over defendant where defendant's sole action was mailing a defamatory tape to Georgia). Plaintiff, however, does not even make this argument in his Response.

Plaintiff has not met his burden of establishing that due process is satisfied such that personal jurisdiction exists over Defendant.[8]

[8] In his response to the motion to dismiss, Plaintiff asks for "limited discovery on the issue of personal jurisdiction . . . because the allegations are that the primary Defendant's act was willful, that it occurred in the State of Georgia and that the resulting injury occurred [t]here." (Opp. to Mot. to dismiss [28], at 7.) There is no evidence to support Plaintiff's jurisdiction theory, and jurisdictional discovery is unnecessary because Plaintiff's claim fails on other grounds.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss [23] is **GRANTED.**

SO ORDERED this 19th day of June, 2007.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE